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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS, KING E. JONES AND BETHLEHEM STEEL CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

In a § 301 action brought by employees under *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), seeking to relitigate contractual disputes decided in "final and binding" arbitration on the ground that the arbitration award was "tainted" by the union's breach of its duty of fair representation in presenting the case to the arbitrator, is the applicable statute of limitations that governing suits to vacate arbitration awards or that governing contract actions generally?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS, KING E. JONES AND BETHLEHEM STEEL CORPORATION,

Respondents.[1]

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

United Steelworkers of America, AFL-CIO-CLC, and its Local Union 2602, hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the judgment in *Donald C. Flowers and King E. Jones* v. *Local 2602 of the United Steelworkers of America, and United Steelworkers of America, International, and Bethlehem Steel Corporation* (C.A. 2, No. 80-7020) (decided March 24, 1980).

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not officially reported, but is reprinted as App. A. to this petition. The judgment of the District Court is reprinted as App. B. The Court of Appeals for the Second Circuit's *per curiam* judgment, reversing the District Court on the basis of its then recently issued

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[1] Although nominally a respondent herein, Bethlehem Steel Corporation was a co-defendant with petitioner in the District Court, and a co-appellee in the Court of Appeals.

decision in *Mitchell* v. *United Parcel Service, Inc.* (No. 79-7803, March 3, 1980), is reprinted as App. C. The opinion of the Second Circuit in *Mitchell* is reprinted as App. D.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was issued on March 24, 1980 (App. C). On June 12, 1980, Justice Marshall signed an order extending the time for filing a petition for writ of certiorari to and including July 7, 1980 (App. E). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 12 of the federal Arbitration Act, 9 U.S.C. § 12, provides in pertinent part as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a)(McKinney), provides as follows:

> When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 213 of the New York Civil Practice Laws and Rules, CPLR § 213, provides in pertinent part as follows:

> The following actions must be commenced within six years: . . .
>
> (2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code . . .

STATEMENT OF THE CASE

Facts[2]

Plaintiffs (respondents in this Court) are two employees of defendant Bethlehem Steel Corporation (hereinafter the "Company"), employed at its Lackawanna, New York plant, and represented for collective bargaining purposes by defendants United Steelworkers of America, AFL-CIO, and its Local Union 2602 (the petitioners in this Court, hereinafter collectively referred to as the "Union").[3] The Union and Company are parties to a collective bargaining agreement which contains, *inter alia*, a grievance and arbitration procedure for resolving differences "as to the meaning and application of the agreement." The agreement empowers the Union to submit grievances which cannot be resolved between the parties to arbitration, and provides that the arbitrator's resolution of a grievance "shall be final and binding upon the Company, the Union, and all Employees concerned therein."

Plaintiffs, who are craft welders, filed several grievances

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[2] The case is here from the district court's granting of a motion to dismiss, and the court of appeals' reversal of that dismissal. Accordingly, the "facts" recited herein are those alleged in the complaint, which for present purposes must be accepted as true.

[3] Because this case arose on appeal from the granting of a motion to dismiss, we accept the complaint's allegations that both United Steelworkers of America ("USWA") and Local 2602 are plaintiffs' bargaining representatives and that both are parties to the collecting bargaining agreement with Bethlehem. In fact, only USWA is the bargaining representative and party to the agreement. The distinction is wholly immaterial to the resolution of the issue presented in this petition.

in 1975 and 1976 protesting that while they were laid off from their jobs the Company assigned their normal craft welding duties to employees who were not craft welders, and that in doing so the Company violated the collective bargaining agreement. The grievances sought backpay for the work opportunities which plaintiffs lost.

The Company insisted throughout all steps of the grievance procedure that it had not violated the agreement, and the Union invoked arbitration. The Union presented the grievances on a consolidated basis at an arbitration hearing conducted on September 8, 1977. On February 24, 1978, the arbitrator issued an award holding that the Company had not violated the agreement by assigning the work to other persons and laying off plaintiffs, and on that basis denied the grievances in their entirety.

The complaint in this action was filed by plaintiffs on January 9, 1979, eleven months after the arbitrator issued the award. The complaint, based upon § 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (a), invokes the limited exception to the finality of arbitration awards recognized in *Hines* v. *Anchor Motor Freight Inc.*, 424 U.S. 554 (1975). Under *Hines*, when an employee's grievance against his employer is submitted to final and binding arbitration under the collective bargaining agreement, the arbitrator's award constitutes the final resolution of the dispute and may not be overturned by a court unless the employee establishes *both* that the award was "tainted", and hence non-binding, because the union committed a breach of its duty of fair representation in its handling of the arbitration which "contributed to the erroneous outcome" of the award, *and* that the award was erroneous. *Id.*, at 568, 570-571.

Count I of the complaint herein alleges that the Company violated the collective bargaining agreement by assigning welding work to others while plaintiffs were laid off. Count II alleges that the Union failed adequately to represent

plaintiffs during the arbitration proceeding, and accordingly that the arbitration award adversely disposing of plaintiffs' claim against the Company "is not binding upon the Plaintiffs." The relief prayed for is substantially that which the arbitrator would have awarded had he upheld the grievance.[4]

Rulings Below

The Union and Company both moved to dismiss the complaint on the ground that it was time-barred. They argued that the "appropriate" state statute of limitations to be "borrowed" and applied to plaintiffs' § 301 *Hines* action was that governing actions to vacate arbitration awards, New York CPLR § 7511, which requires actions to be brought within 90 days after receipt of the award. Plaintiffs, on the other hand, argued for the application of New York's six year statute of limitations for claims based on contract. CPLR § 213(2). There was no dispute as to the fact that plaintiffs had filed their complaint more than 90 days, but less than six years, after their receipt of the arbitrator's award.

The District Court granted the motions to dismiss. It rejected plaintiffs' contention that their *Hines* action was, for purposes of determining "the appropriate state statute of limitations," more akin to a breach of contract action than an action to vacate an arbitration award. The court reasoned that as plaintiffs were seeking to relitigate the dispute which they had lost before the arbitrator, a ruling in their favor would be tantamount to vacating the arbitration award. *App.* 3-4. The court noted that the precise ques-

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[4] In addition to seeking compensation for the Company's alleged breach of the agreement—the relief which was sought from the arbitrator—plaintiffs also seek damages from the Union for its alleged breach of the duty of fair representation (presumably, to compensate for the added difficulty and expense to which plaintiffs had been put in securing their recovery from the Company; see *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970)).

tion before it had been analyzed by other courts, and that "where a grievance has proceeded to arbitration and state law (such as NY CPLR § 7511) provides for a particularly short period of time in which to challenge an arbitrator's decision, these courts have uniformly held that the special statute of limtiations was applicable." *App* 2, *citing Wallace* v. *American Tel. & Tel. Co., Inc.*, 460 F.Supp. 755, 758 (E.D.N.Y. 1978) (and cases therein cited); *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976). The court continued:

> Not only is [§ 7511] the statute most specifically and obviously applicable to fair-representation suits seeking to overturn the decision of an arbitrator, but applying it to federal labor law also serves the same policies that the statute serves in state law matters. Arbitration, precisely because it offers a quick, sure and inexpensive route to resolution of disputes, is a major component—perhaps the most important single component—of federal labor law. *See, Steel Workers* v. *Warrier & Gulf Co.*, 363 U.S. 574 (1960). (*App.* 3).

Plaintiffs appealed, briefs were filed, and oral argument scheduled for March 24, 1980. Three weeks before this scheduled argument, a panel of the Second Circuit issued a decision in an unrelated case posing the identical question of law. *Mitchell* v. *United Parcel Service, Inc.*, ... F.2d ..... (App. 7-13 herein). The *Mitchell* panel rejected the conclusion of the district court in that case—the same conclusion as was reached by the district court in the instant case —that the most "appropriate" state statute of limitations for a *Hines* action is the statute governing actions to vacate arbitration awards, instead holding that the six year contract statute governed. The crux of its reasoning is contained in the following passage:

> In *Hines*, the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contest-

> ing arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenged arbitral decisions in conjunction with charges of bad faith representation by their union. (App. 11).

The panel assigned the instant case thereupon entered a *per curiam* judgment reversing the district court's dismissal of the instant case "based on this court's decision in *Mitchell* v. *United Parcel Service, Inc.*" (App. 6).

REASONS FOR GRANTING THE WRIT

The issue presented—what time limit governs actions brought pursuant to *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)—is important, arises frequently, and has generated a substantial conflict among the lower federal courts. Its resolution will determine the confidence which parties can place in the finality of their labor arbitration awards and, ultimately, their willingness to continue using arbitration as the means for resolving disputes arising under collective bargaining agreements. This Court should resolve the issue now; delay would prolong the existing uncertainty as to the finality of arbitration awards, and would be a disservice to national labor policy.

1. The commitment of national labor policy to the finality of labor arbitration awards has been declared by Congress,[5] and repeatedly affirmed by this Court.[6] Of course, that commitment does not preclude suits to vacate arbitration awards where the awards are beyond the arbitra-

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[5] Section 203(d) of the LMRA, 29 U.S.C. § 173(d), provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes . . ."

[6] See, e.g., *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Humphrey* v. *Moore*, 375 U.S. 335, 351 (1964); *Hines, supra*, 424 U.S. at 562-563.

tor's power,[7] or premised upon a denial of due process,[8] or secured through corruption or other impropriety.[9] And in *Hines*, this Court recognized another limited exception to the finality of labor arbitration awards: where the award has been "tainted" by a union's breach of its duty of fair representation in presenting the employee's case to the arbitrator.

The holding in *Hines* has spawned a large number of cases presenting the issue—not addressed in *Hines*—of what time limit governs the institution of such an action. The lower courts are in agreement as to the *standards* which govern the resolution of that issue—as § 301 does not prescribe a limitations period, the courts must "borrow" the most "appropriate" limitations period prescribed elsewhere, determining, as "a matter of federal law," which period "best effectuates the policy at issue"[10] —but they are in conflict as to the result which follows from application of those standards.

Forty-two states have enacted special statutes of limitations governing suits to vacate arbitration awards, which require that such suits be filed within a relatively short time period after receipt of the award (most often 90 days).[11] The federal courts have uniformly held that when an *employer* or *union* sues under § 301 to vacate an arbi-

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[7] *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 597 (1960).

[8] See, e.g., *Harvey Aluminum* v. *United Steelworkers*, 263 F. Supp. 488 (C.D. Cal. (1967).

[9] *Local 771, IATSE* v. *RKO General, Inc.*, 546 F. 2d 1107, 1113 (2nd Cir. 1977). See also *Hines, supra*, 424 U.S. at 570.

[10] *International Union, United Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705 (1965); *Mitchell, supra*, at *App. 10* (2 Cir.); *Butler* v. *Local Union 823, Intl. Bhd. of Teamsters*, 514 F.2d 442, 446 (8th Cir. 1975); *Charney* v. *Thomas* 372 F.2d 97, 100 (6 Cir. 1967).

[11] These statutes are collected in Appendix F to this petition, *App 15-18*. In addition, the Federal Arbitration Act requires that suits brought thereunder to vacate arbitration awards be filed

tration award these short time limits are applicable [12]—a holding with which the court below apparently agrees (App. 12). And the federal *district* courts have uniformly held that the same time limit which applies to employers and unions also controls actions by *employees,* under *Hines,* seeking to relitigate contract disputes decided in arbitration.[13] But the two Circuit Courts of Appeals which

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within three months, 9 U.S.C. § 12. At least one district court has applied a three-month limitations period to a *Hines* action "borrowing" from the Arbitration Act. *Pizzuto,* cited *infra,* n. 13. See also *Local 670* v. *Kerr-McGee Refining Corp.,* —F 2d—, 103 LRRM 2988, 2990 (10th Cir. 1980) (Holloway, J., concurring and dissenting). If certiorari is granted, our brief would, in addition to arguing for application of the 90-day period prescribed in New York CPLR § 7511, explore the propriety of borrowing the Arbitration Act's three month time limit as a uniform measure applicable to *Hines* actions in *all* states.

[12] *Hana* v. *Sheet Metal Workers,* 378 F. Supp. 1001, 1003-04 (S.D. N.Y. 1974); *Teamsters* v. *Motor Freight,* 356 F. Supp. 724, 725 (W.D. Pa. 1973); *Local 800* v. *Lakeshore Motor Freight,* 102 LRRM 2046, 2047 (W.D. Pa. 1979); *UMW* v. *Jones & Laughlin Steel Corp.,* 378 F. Supp. 1206, 1209-12 (W.D. Pa. 1974); *UAW* v. *LaCrosse Cooler Co.,* 406 F. Supp. 1213, 1214-15 (W.D. Wisc. 1976); *Meat Cutters* v. *Landy Packing Co.,* 96 LRRM 2874, 2877 (D. Minn. 1976).

[13] *Wallace* v. *American Tel. & Tel. Co.,* 460 F. Supp. 755 (E.D. N.Y. 1978); *Barbarino* v. *Anchor Motor Freight Inc.,* 421 F. Supp. 1003 (W.D. N.Y. 1976); *DeLorto* v. *United Parcel Service, Inc.,* 401 F. Supp. 408, 409 (D. Mass. 1975); *Pizzuto* v. *Hall's Motor Transit Co.,* 409 F. Supp. 427, 429 (E.D. Va. 1976); *Lunceford* v. *Teamsters,* 87 LRRM 2011, 2012 (C.D. Cal. 1974); *Elrod* v. *Teamsters,* 77 LRRM 2619, 2621 (C.D. Cal. 1971), aff'd on other grounds, 85 LRRM 2189 (9th Cir. 1973); *Howerton* v. *Christienson Co.,* 76 LRRM 2937, 2938-39 (N.D. Cal. 1971); *Siskey* v. *General Teamsters,* 419 F. Supp. 48, 50, 54 n. 8 (W.D. Pa. 1976) (dictum). See also *Gatlin* v. *Missouri-Pac. R. Co.,* 475 F. Supp. 1083 (E.D. Ark. 1979). In addition to the reported decisions, it is probable that there are a substantial number of unreported district court decisions to the same effect: for example, the district court decisions in the instant case and *Mitchell* were unreported.

have addressed the question—the Second and Sixth—have disagreed with the uniform district court view, rejecting the application of these statutes in *Hines* actions in favor of much longer contract or personal injury statutes.[14]

2. While there is not yet a circuit conflict, district courts in at least five circuits are applying a different standard from that announced by the Second and Sixth Circuits;[15] and the resultant uncertainty injects an instability into *all* collective bargaining relationships, as we explain below. In consequence, the delay engendered, were this Court to await a circuit conflict, would be detrimental to national labor policy.

The reasons why finality of labor arbitration awards is a cornerstone of national labor policy are well established. Such awards determine the "law of the shop"; and they represent the parties' choice of a peaceful means of resolving contract disputes in preference to industrial warfare.[16] These objectives are served only if all those concerned—employer, union, and employees—know that arbitrators' rulings are, truly, final and binding once rendered.

Of course, as *Hines* recognizes, there can be competing concerns which warrant exceptions to the finality of arbitration awards. But national labor policy has a heavy stake

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[14] The Second Circuit, in *Mitchell, supra,* App. 7-14, and the instant case, "borrowed" New York's six-year statute governing general contract actions. The Sixth Circuit, in *Smart* v. *Ellis Trucking Co.*, 580 F. 2d 215, 219 (6th Cir. 1978), "borrowed" Michigan's three-year statute governing personal injury actions.

[15] *DeLorto, supra* (within First Circuit); *Pizzuto, supra* (within Fourth Circuit); *Lunceford, Elrod* and *Howerton, supra* (all within Ninth Circuit); *Siskey, supra* (within Third Circuit); and *Gatlin* (within Eighth Circuit).

[16] *Steelworkers* v. *Warrier & Gulf Co.*, 363 U.S. 574, 578-582, (1960).

in the length of time during which the finality of awards is suspended pending invocation of these exceptions. The court below has held that employees can file *Hines* actions six years after awards have been received. This means that no arbitration award which favors an employer [17] is truly "final" for six years—all such awards are subject to challenge at any time during that period. In consequence, all of the purposes which finality is designed to serve are undermined. The parties cannot be sure that the award will survive as the "law of the shop"; in negotiating new agreements, they cannot be certain that they know the meaning of the old; and the potential for a grievance to erupt into industrial unrest will continue for years. Equally disturbing, from a practical standpoint, is that the decision below furnishes a vehicle by which disaffected employees can generate instabilities in collective bargaining relationships—whether out of antipathy for the employer or for internal union considerations—years after matters presumably had been set at rest. Indeed, employers' willingness to continue to agree to the arbitration of contractual disputes ultimately might be affected by the knowledge that no employer arbitral victory is "final"—in the sense that it is beyond legal challenge—for six years.

Of course, if the decision below is correct, these consequences are simply the unfortunate residue of a proper application of federal law. But as the volume of district court decisions going the other way suggests, there is substantial reason to doubt the correctness of the decision below. And far from being mere residue, the considerations described above should be essential components of the determination as to which limitations period "best effectuates the policy at issue."

Because the decision below cripples the role of arbitra-

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[17] If the award is wholly in favor of the employee(s), there will be no occasion for a *Hines* challenge.

tion as a stabilizer of industrial relations, and will continue to have its crippling effect until this Court determines its correctness, certiorari should be granted now, without countenancing the delay inherent in awaiting a circuit conflict.

3. There is substantial reason to doubt the correctness of the decision below. As explained above, national labor policy has a strong interest in having challenges to arbitration awards initiated promptly. And, as the district court herein recognized, the same consideration—a desire to accellerate the finality of arbitration awards—underpins the state statutes prescribing unusually short time periods for such challenges. The reasoning of the Court of Appeals—that a *Hines* action is not really a suit to vacate an award, but rather a suit to relitigate the underlying contract dispute—is fallacious: *every* suit to vacate an arbitration award has as its objective removing the finality of the award so that the underlying dispute may be relitigated. The Court of Appeals thus saw a difference where none exists: *Hines* merely added another ground upon which an arbitration award may be vacated as "tainted."

The Court of Appeals was concerned that requiring employees to file *Hines* actions within 90 days of receipt of the award might be unreasonable, and thus effectively dilute the right which *Hines* created. But precisely because national labor policy depends upon the prompt resolution of disputes, employees are everywhere subjected to exceptionally short time limits. Under most collective bargaining agreements, they must have initiated the grievance which eventuates in a *Hines* action in far less than 90 days;[18] under the NLRA, they must file unfair labor

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[18] Under the collective bargaining agreement in the instant case, grievances had to be initiated within 30 days of the violation alleged. It is not uncommon to find agreements which prescribe even shorter time limits for filing grievances. BNA, *Collective Bargaining Negotiations and Contracts* ¶ 51:82 (1976).

practice charges within six months, 29 U.S.C. § 160; and under Title VII, they are required to file lawsuits within 90 days of receiving a right to sue letter from the EEOC, 42 U.S.C. § 2000e-5(f)(1). This Court has understood Congress to have intended that these time limits must be strictly complied with by employees, *Electrical Works* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). At the least, it is not self-evident that a concern for the capicity of employees to initiate suits within 90 days justifies the enormous instability which would be injected into all collective bargaining relationships by a rule withdrawing finality from all arbitration awards favoring employers for six years.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to decide the important question presented herein.

Respectfully submitted,

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Appendix A

MEMORANDUM AND ORDER, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK (HON. JOHN T. ELFVIN), 11-29-79.

DONALD C. FLOWERS
AND
KING E. JONES,
Plaintiffs,

v.

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA,
AND
UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL,
AND
BETHLEHEM STEEL CORPORATION,
Defendants.

CIV-79-40

MEMORANDUM AND ORDER

This is an unfair-representation action under section 301 (29 U.S.C. § 185) of the Labor Management Relations Act ("the LMRA"). Plaintiffs, craft welders who were laid off by Bethlehem Steel Corporation ("Bethlehem") from November 1975 until April 1976, allege that they were laid off in violation of the collective bargaining between Bethlehem and The United Steel Workers of America, International ("USW"), and that Local 2602 of the United Steel Workers of America ("Local 2602"), which presented plaintiffs' grievances first to Bethlehem and then to an arbitrator (who held in favor of Bethlehem), presented their grievances so negligently as to amount to an arbitrary and capricious failure to present their arguments. The arbitrator handed down his decision adverse to plaintiffs February 24, 1978; the instant suit was filed January 19, 1979.

Now before me is defendants' motion to dismiss this action on grounds that the statute of limitations has run.

The LMRA contains no statute of limitations. The United

States Supreme Court has held that, in the absence of such a statute, federal courts are to apply, as a matter of federal law, the "appropriate state statute of limitations." *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 705 (1966).

The Court has provided no specific guidance as to the statute of limitations appropriate to unfair-representation suits. However, this question has been analyzed in a number of district court opinions. Where a grievance has proceeded to arbitration and state law (such as N.Y. CPLR § 7511) provides for a particularly short period of time in which to challenge an arbitrator's decision, these courts have uniformly held that the special statute of limitations was applicable. *See, e.g., Wallace* v. *American Tel. & Tel. Co., Inc.*, 460 F.Supp. 755, 758 (E.D.N.Y. 1978), and cases therein cited; *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976).

None of the cases cited by plaintiffs provides substantial support to their position to the contrary. The controversy in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976), *rev'g in part* Hines *v.* Local Union No. 377, Chauffeurs, Team., W. & H., 506 F.2d 1153 (6th Cir. 1974), arose not in New York, but in Ohio and Michigan, and the record is devoid of any suggestion that any statute of limitations was ever in issue. In *Abrams* v. *Carrier Corporation*, 434 F.2d 1234 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), the United States Court of Appeals for the Second Circuit did conclude that New York's six-year statute of limitations for actions "upon a contractual obligation" (*Id.*, at 1253, *quoting* New York's Civil Practice Law and Rules ("CPLR") § 213(2)) was appropriate to the unfair-representation suit then at issue. However, there had been no arbitration of that dispute and the court was careful to note that its holding was not automatically applicable to all suits brought under the "fair representation rubric," and that all the circumstances of any particular action would have to be examined to determine what period would be appro-

priate. *Id.*, at 1252 n. 15. This court and a number of other federal district courts have concluded that the appropriate statute is CPLR § 7511 or its analogue. Not only is it the statute most specifically and obviously applicable to fair-representation suits seeking to overturn the decision of an arbitrator, but applying it to federal labor law also serves the same policies that the statute serves in state law matters. Arbitration, precisely because it offers a quick, sure and inexpensive route to resolution of disputes, is a major component—perhaps the most important single component—of federal labor law. *See, Steel Workers* v. *Warrier & Gulf Co.*, 363 U.S. 574 (1960). The admittedly brief 90-day statute of limitations provided in CPLR § 7511 serves to promote the use of arbitration in New York by decreasing the possibility that an arbitral award may be challenged. Adoption of this statute to suits under section 301 of the LMRA serves precisely the same important purpose. In *Auto Workers* v. *Hoosier Corp., supra,* the United States Supreme Court applied similar reasoning in deciding to apply a six-year statute of limitations instead of an also arguably applicable 20-year statute, noting that only a six-month statute of limitations applied to challenges of unfair-labor practice determinations (29 U.S.C. § 160(b)) and that rapid resolution of industrial suits was a goal of federal labor law. 383 U.S. at 707.[1]

Plaintiffs make two additional arguments in support of their position that they are not barred by CPLR § 7511. First, they claim that they are not seeking to vacate an award of an arbitrator. It is true that they make no such demand on the face of their Complaint. But the remedies they seek before me were sought before and denied by the

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[1] Plaintiffs herein make no claim of fraud on the part of the Union or collusive behavior between the defendant unions and Bethlehem that they did not discover and could not reasonably have discovered within 90 days after the arbitrator's decision. If they had so alleged, substantially different policy considerations might have come into play.

arbitrator. Before I may award plaintiffs their requested relief, I must vacate the contrary decision of the arbitrator.

Second, plaintiffs claim that section 7511 is not applicable, as plaintiffs would, under New York labor law, have no standing under that section to contest an arbitrator's award. This argument must fail on the fundamental grounds that federal and not state law controls suits under section 301 and that plaintiffs clearly have standing under that section. *Hines* v. *Anchor Motor Freight, supra. Auto Workers* v. *Hoosier Corp., supra,* applies only the chronological requirements of state law, in the absence of a federal legislative standard. 383 U.S. at 703-04. It applies no other state law standards. *See, Wallace v. American Tel. & Tel. Co., Inc., supra,* at 575.

For the reasons hereinabove stated, defendants' motion to dismiss must be and accordingly is hereby ORDERED granted.

Dated: Buffalo, N.Y.
Dated: November 29, 1979

/s/ JOHN T. ELFVIN
U.S.D.J.

Appendix B

JUDGMENT DISMISSING COMPLAINT, 12-5-79.

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE No. 79-40

DONALD C. FLOWERS & KING E. JONES *vs.* LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA & UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL & BETHLEHEM STEEL CORPORATION	JUDGMENT

This action came on for (hearing) before the Court, Honorable John T. Elfvin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged.

The defendants' motion to dismiss is granted.

Appendix C

JUDGMENT OF THE

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
Circuit Judges

DONALD C. FLOWERS AND KING E. JONES, *Plaintiffs-Appellants,* *against* LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA, AND UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL, AND BETHLEHEM STEEL CORPORATION, *Defendants-Appellees.*	80-7020

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed based on this court's decision in *Mitchell* v. *United Parcel Service, Inc.*, slip op. 1525 (2d Cir. Mar. 3, 1980), and the case is remanded to the district court.

/s/ J. EDWARD LUMBARD
/s/ WILLIAM H. MULLIGAN
/s/ JAMES L. OAKES

Appendix 7

Appendix D

DECISION OF COURT OF APPEALS IN *MITCHELL* v. *UNITED PARCEL SERVICE, INC.*, UPON WHICH JUDGMENT IN INSTANT CASE IS BASED

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 748—September Term, 1979
(Argued February 29, 1980 Decided March 3, 1980)
Docket No. 79-7803

WILLIAM MITCHELL,
Plaintiff-Appellant.

v.

UNITED PARCEL SERVICE, INC., AND DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177,
Defendants-Appelles

BEFORE

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.**

TIMBERS, *Circuit Judge*:

Appellant William Mitchell appeals from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), as barred by the 90 day limitation period of § 7511 of the New York Civil Prac-

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* Hon Henry F. Werker, United States District Judge for the Southern District of New York, sitting by designation.

tice Law & Rules. The sole issue on appeal [1] is whether the district court erred in applying § 7511 to the instant action. We hold that it did.

I.

Appellant, a member of Local Union #177 of the Department Store and Wholesale Drivers, Warehousemen and Helpers, was employed as a car washer by United Parcel Service, Inc. (UPS). In January 1977 appellant was discharged by UPS for dishonest acts, including "stealing time" and falsifying time cards. Appellant, who denied the charges against him, requested that his union file a grievance on his behalf contesting the discharge. As a member of Local Union #177, the terms of appellant's employment, including grounds for discharge and grievance procedures, were governed by the collective bargaining agreement between UPS and Local Union #177. Pursuant to this agreement, appellant's grievance was submitted to an arbitration panel—the Joint Atlantic Area Parcel Grievance Committee—for final resolution. Appellant was represented by his union at the hearing before this panel. On February 16, 1977 the arbitration panel denied appellant's grievance and upheld his discharge. According to the collective bargaining agreement, this decision was final and binding.

Seventeen months after the arbitral decision was rendered, appellant filed an action under LMRA § 301 [2] against

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[1] On appeal, appellees argue that the complaint was properly dismissed not only because it was time-barred, but also because appellant failed to exhaust his intra-union remedies and failed to raise a triable issue concerning appellee union's alleged breach of its duty of fair representation. The district court, however, did not address these issues. We therefore shall not address them for the first time here. Appellees are free to raise these issues in the district court on remand.

[2] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), provides in relevant part:

"Suits for violation of contracts between an employer and a

his union and employer, alleging that UPS had breached the collective bargaining agreement by wrongfully discharging him and that Local Union #177 had breached its statutory duty of fair representation by the manner in which it handled appellant's grievance. The district court granted appellees' motions for summary judgment, dismissing the complaint on the ground that the action was barred by the 90 day limitation period set forth in § 7511.[3]

II.

There is no federal statute of limitations applicable to § 301 actions. As a result, the Supreme Court has held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966).

The district court, reasoning that "[t]he effect of any grant of relief . . . would be to vacate the determination of the arbitrators," held that the appropriate state statute of limitations was the 90 day period for "application[s] to vacate or modify an [arbitration] award". N.Y.Civ.Prac. Law § 7511 (McKinney 1963). We disagree. We hold that the limitation period which should have been applied is New York's six year period for actions alleging breach of contract. N.Y.Civ.Prac.Law § 213(2) (McKinney 1972).

In addressing the question of which New York statute of

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labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[3] N.Y. Civ. Prac. Law § 7511 (McKinney 1963) provides that: "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

limitations should be applied in this case, we turn first to our decision in *Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2 Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971), where we held that:

> "when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period . . . is the six-year limitation set out in N.Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied.' " *Id.* at 1252-53 (footnote omitted).

The factual claims underlying the § 301 action in *Abrams* were the same as those in the instant case, namely, a wrongful discharge by the employer coupled with a bad faith failure by the union to represent the employee adequately in discharge proceedings. The only difference between *Abrams* and the instant case is that here the employee was terminated after his grievance was rejected at arbitration, whereas in *Abrams* the grievance was not taken to arbitration. Citing this difference, appellees urge that we apply a different statute of limitations to the § 301 action in this case than the six year statute of limitations which we applied to the § 301 action in *Abrams.* We do not believe that such a fractionalized approach to § 301 wrongful discharge actions is warranted.

In determining which state statute of limitations to apply to a federal cause of action, courts must characterize the action in the manner that "best effectuates the federal policy at issue." *Butler* v. *Local Union 823, Int'l Brotherhood of Teamsters, etc.*, 514 F.2d 442, 446 (8 Cir. 1975); *Charney* v. *Thomas,* 372 F.2d 97, 100 (6 Cir. 1967). Appellees, pointing chiefly to the federal policy of according finality to arbitration awards and the federal goal of "relatively rapid disposition of labor disputes," *Int'l Union, etc.* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 707, argue

that § 301 wrongful discharge actions commenced *after* arbitral decisions should be governed by the 90 day limitation period even if other § 301 wrongful discharge actions are governed by another statute.

We do not agree. The Supreme Court has made it clear that the federal policy of according finality to arbitration awards must yield to the conflicting federal policy of providing employees with the opportunity "to secure individual redress for damaging failure of the employer to abide by the [collective bargaining] contract." *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). In *Hines*, the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contesting arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenge arbitral decisions in conjunction with charges of bad faith representation by their union.

Furthermore, § 301 actions do not require the short limitation periods which are generally applied to assaults on arbitration awards. Contrary to the district court's characterization, § 301 actions cannot be equated to direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Arbitration awards cannot be vacated pursuant to § 301 on the ground that the arbitrators erred in their factual findings, or that the arbitrators reached faulty legal conclusions, or that the proceedings were flawed. *Hines* v. *Anchor Motor Freight, Inc., supra*, 424 U.S. at 571; *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F. Supp. 1003, 1005 (W.D.N.Y. 1976). Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate *both*

that the employer violated the collective bargaining agreement by discharging him *and* that the union violated its statutory duty by failing to represent him in good faith.

This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted.

Neither do we accept the argument that the 90 day limitation period is necessary to further the federal goal of relatively rapid disposition of labor disputes. The Court in *Hoosier, supra,* 383 U.S. at 707, indicated that a six year statute of limitations adequately furthered this federal labor policy. Far from suggesting that a 90 day period was needed to reach the goal of "relatively rapid" resolution of disputes, the *Hoosier* Court indicated that "unusually short" limitation periods—such as a 60 day New Mexico statute—should not be applied to § 301 actions. 383 U.S. at 707 n.9.

Finally, we note that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant. *In re Soto,* 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960). This difference is not an insubstantial one. While it may be reasonable to require the parties to a bargaining agreement (*i.e.,* the union and the employer) to contest an arbitral decision within 90 days, individual employees may well lack the resources to act as quickly. Second, a § 301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. "Although the effect of a judgment for [the discharged employee] would

be to nullify the arbitral decision, the § 301 action is 'independent' of the grievance process. . . . Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance." *Smart* v. *Ellis Trucking Co.*, 580 F.2d 215, 219 (6 Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *see Hines* v. *Anchor Motor Freight Inc., supra*, 424 U.S. at 567-68; *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

Regardless of whether an arbitration decision has been entered, the issue in a § 301 wrongful discharge action remains whether the employer has breached the collective bargaining contract and whether a union breach of duty contributed to the contractual breach. *Hines* v. *Anchor Motor Freight, Inc., supra*, 424 U.S. at 568. The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitration award.

III.

In summary, we reject the district court's characterization of the instant § 301 action as an action to vacate an arbitration award, and accordingly reverse the district court's dismissal of appellant's complaint as barred by § 7511. We hold that New York's six year limitation period for contractual breaches, § 213(2), is applicable to LMRA § 301 actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless of whether the discharge was upheld by an arbitral panel or became final short of arbitration. Applying the six year limitation period of § 213(2) provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions. Thus, application of § 213(2) rather than § 7511 allows us to "best effectuate" the several federal policies implicated by actions under § 301.

Reversed and remanded.

Appendix E

Supreme Court of the United States

No. A-1085

LOCAL 2602 OF THE UNITED STEEL WORKERS OF AMERICA AND UNITED STEEL WORKERS OF AMERICA, INTERNATIONAL,

Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 7, 1980 and it will not be extended further.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United State

Dated this 12th
day of June, 1980

Appendix F

STATE STATUTES OF LIMITATIONS

I. State Statutes of Limitations Governing Actions to Vacate Arbitration Awards.

Forty-two (42) states have enacted special statutes of limitations governing actions to vacate arbitration awards. In twenty-eight (28) of these states, the time limit prescribed is 90 days:

> Alaska Stat. § 9.43.120; Ark. Stat. Ann. § 34-522; Colo. Rev. Stat. § 13-22-214; Del. Code Ann. Tit. 10 § 5714; Fla. Stat. Ann § 682.13; Idaho Code § 7-912; Ill. Ann. Stat. ch. 10 § 112 (Smith-Hurd); Ind. Code § 34-4-2-13; Kan. Stat. Ann § 5-412(b); LSA-R.S. 9:4213 (West); Me. Rev. Stat. Ann. Tit. 14 § 5938; Minn. Stat. Ann. § 572.20; Nev. Rev. Stat. Ch. 38 § 145 (2); N.J. Stat. Ann. § 2A:24-7 (West); N.M. Stat. Ann. § 44-7-13; N.Y. CPLR § 7511 (McKinney); N.C. Gen. Stat. § 1-567.13; Ohio Rev. Code Ann. § 2711.13 (Page); Okla. Stat. Ann. Tit. 15 § 812 (West); 5 Pa. Cons. Stat. Ann. § 173 (Purdon); R.I. Gen. Laws § 10-3-15; S.C. Code § 15-48-130; S.D. Comp. Laws § 21-25A-25; Tex. Ann. Civ. St. art. 237; Utah Code Ann. § 78-31-18; Wash. Rev. Code Ann. § 7.04.180; Wis. Stat. Ann. § 788.13 (West); Wyo. Stat. § 1-36-114

In nine (9) states the time limit prescribed is less than 90 days:

> Ala. Code § 6-6-15 (10 days); Ariz. Rev. Stat. Ann. § 12-1506 (10 days); Conn. Gen. Stat. Ann. § 52-420 (West) (30 days); Hawaii Rev. Stat. § 658-11 (10 days); Md. Stat. Ann. CJ § 3-224 (30 days); Mass. Gen. Laws Ann. ch. 150C § 11 (30 days); Mich. Gen. Court Rules 769 (20 days); Ore. Rev. Stat. § 33.310 (20 days); Vt. Stat. Ann. tit. 21 § 541 (30 days)

The statute of limitations for bringing an action to vacate an arbitration award is 100 days in California (Calif. Civil Proc. Code § 1288 (Deering)) and one year in New Hampshire (N.H. Rev. Stat. Ann. § 542.8). In Mississippi and Missouri an action to vacate an arbitration award must be

brought at the next term of court after the award is made. (Miss. Code Ann. § 11-15-29; Mo. Ann. Stat. § 435.120 (Vernon)). In Georgia, after an award is returned to superior court and entered in its minutes, either party can, at the term to which said award is returned, suggest that the award is illegal (Ga. Code Ann. § 7-219).

II. State Statutes of Limitations Governing Actions for Breach of Written Contract in the 42 States Listed in Part I.

In each of the forty-two states with a special arbitration statute of limitations, the general statute governing actions for breach of written contract prescribes a much longer time period. The most common time limit for the latter is six years, found in twenty-four (24) of such states:

> Ala. Code § 6-2-34; Alaska Stat. § 09.1.050; Conn. Gen. Stat. Ann. § 52-576 (West); Colo. Rev. Stat. § 13-80-110; Ga. Code Ann. § 3-705; Hawaii Rev. Stat. § 657-1; Me. Rev. Stat. Ann. tit. 14 § 752; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807(8) Minn. Stat. Ann. § 541.05; Miss. Code Ann. § 15-1-49; Nev. Rev. Stat. ch. 11 § 190.1; N.H. Rev. Stat. Ann. § 3508.4; N.J. Stat. Ann. § 2A:14-1 (West); N.M. Stat. Ann. § 37-1-3; N.Y. CPLR § 213(2); Ore. Rev. Stat. § 12.080; 42 Pa. Cons. Stat. Ann. § 5527; S.C. Code § 15-3-530; S.D. Comp. Laws § 15-2-13; Utah Code Ann. § 78-12-23; Vt. Stat. Ann. tit. 12 § 511; Wash. Rev. Code Ann. § 416.040; Wis. Stat. Ann. § 893.19 (West)

The statute of limitations for bringing an action for breach of a written contract is twenty years in Indiana (Ind. Code § 34-1-2-2); 15 years in Ohio (Ohio Rev. Code Ann. § 2305.06); and ten years in the following five states:

> Ill. Ann. Stat. ch. 83 § 17 (Smith-Hurd); L.S.A.-C.C. art. 3544; Mo. Ann. Stat. § 516.110; R.I. Gen. Laws § 9-1-13; Wyo. Stat. § 1-3-105

The statute of limitations for bringing an action for a breach of a written contract is five years in the following five states:

Ark. Stat. Ann. § 37-209; Fla. Stat. Ann. § 95.11(2); Idaho Code § 5-216; Kan. Stat. Ann. § 60-511; Okla. Stat. Ann. tit. 12 § 95(1st) (West)

The statute of limitations for bringing an action for a breach of a written contract is four years in the following three states:

Ariz. Rev. Stat. Ann. § 12-550; Calif. Civil Proc. Code § 337; Texas Stat. Ann. Civ. St. § 5529

The statute of limitations for bringing an action for a breach of a written contract is three years in the following three states:

Del. Code Ann. tit. 10 § 8106; Md. Stat. Ann. CJ § 5-101; N.C. Gen. Stat. § 1-52

III. State Statutes of Limitations Governing Actions for Breach of Oral Contract in the 42 States Listed in Part I.

In *United Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), this Court, in the context of a § 301 action which did not involve an arbitration award, upheld "borrowing" the state statute of limitations applicable to suits on oral (rather than written) contracts. In each of the forty-two states with a special arbitration statute of limitations, the statute governing actions for breach of an oral contract prescribes a much longer time period.

The statute of limitations for bringing an action for breach of an oral contract is six years in the following eighteen states:

Ala. Code § 6-2-34; Alaska Stat. § 09.10.050; Colo. Rev. Stat. § 13-80-110; Hawaii Rev. Stat. § 657-1; Ind. Code § 34-1-2-1; Me. Rev. Stat. Ann. tit. 14 § 572; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807 (8); Minn. Stat. Ann. § 541.05; N.H. Rev. Stat. Ann. § 508.4; N.J. Stat. Ann. § 2A:14-1 (West); N.Y. CPLR § 213(2); Ohio Rev. Code Ann. § 23.05.07 (Page); Ore. Rev. Stat. § 12.080; S.C. Code § 15-3-530; S.D. Comp. Laws § 15-2-13; Vt. Stat. Ann. tit. 12 § 511; Wisc. Stat. Ann. § 893.19

Appendix 18

The statute of limitations for bringing an action for breach of an oral contract is five years in the following three states:

Ark. Stat. § 37-213; Ill. Ann. Stat. ch. 83 § 16; Mo. Ann. Stat. § 516.120(1)

The statute of limitations for bringing an action for breach of an oral contract is four years in the following nine states:

Ariz. Rev. Stat. § 12-550; Fla. Stat. Ann. § 95.11(3); Ga. Code Ann. § 3-706; Idaho Code § 5-217; Nev. Rev. Stat. ch. 11 § 190.2; N.M. Stat. Ann. § 37-1-4; 42 Pa. Cons. Stat. Ann. § 5525; Tex. Stat. Ann. Civ. St. art. 5529; Utah Code Ann. § 78-12-25

The statute of limitations for bringing an action for breach of an oral contract is three years in the following eight states:

Conn. Gen. Stat. Ann. § 52-581; Del. Code Ann. tit. 10 § 8106; Kan. Stat. Ann. § 60-512; Md. Stat. Ann. CJ § 5-101; Miss. Code Ann. § 15-1-29; N.C. Gen. Stat. § 1-52; Okla. Stat. Ann. tit. 12 § 95(2d); Wash. Rev. Code Ann. § 4.16.080

In Louisiana and Rhode Island the statute of limitations for bringing an action for breach of an oral contract is ten years (L.S.A.-C.C. art. 3544; R.I. Gen. Laws § 9-1-13).

In Wyoming the statute of limitations is eight years (Wyo. Stat. § 1-3-105) and in California the statute of limitations is two years (Calif. Civil Proc. Code § 339).

No. 80-26

Supreme Court, U. S.
FILED
SEP 24 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS, KING E. JONES AND BETHELEM STEEL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL MEMORANDUM TO BRING TO THE COURT'S ATTENTION THE DEVELOPMENT OF A CONFLICT AMONG THE CIRCUITS

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TABLE OF AUTHORITIES

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Hines v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) 3

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Smart v. *Ellis*, 580 F.2d 215 (6th Cir. 1978), cert. denied, 440 U.S. 998 (1979) 2

Vaca v. *Sipes*, 386 U.S. 171 (1966) 3

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§ 301(a), 29 U.S.C. § 185(a) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-26

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL MEMORANDUM TO BRING TO THE COURT'S ATTENTION THE DEVELOPMENT OF A CONFLICT AMONG THE CIRCUITS

Petitioners submit this supplemental brief, pursuant to Supreme Court Rule 22(6), to bring to the Court's attention the recent decision of the Third Circuit in *Liotta* v. *National Forge Co.* (Nos. 79-2124, 79-2252, September 10, 1980), which is in direct conflict with the decision of the Second Circuit from which certiorari is sought in the instant case. Since, at the time our petition was filed, there was no circuit split on the question presented herein, the issuance of the *Liotta* decision adds especial force to our request that certiorari be granted.

As in the instant case (see Pet. at 4-5),[1] the plaintiff in

[1] References to the pending petition for certiorari in the above-captioned matter will be in the form of "Pet. at ——," and references to the appendices to that petition will be in the form of "App. at ——." References to the appendix to this supplementary brief will be in the form of "Supp. App. at ——."

Liotta sought to relitigate through a § 301 suit[2] a contractual dispute with his employer that had been unsuccessfully processed by his union to arbitration. There, as here, the plaintiff claimed that the arbitrator's unfavorable decision resulted from a breach of the union's duty of fair representation. Supp. App. at 2, 4. In direct conflict with the decision below, the Third Circuit in *Liotta* held that the applicable statute of limitations in such a suit is the state statute governing suits to vacate arbitration awards and not that governing contract actions generally.

The panel of the Third Circuit that decided *Liotta* apparently was not aware of the Second Circuit's contrary view.[3] However, the *Liotta* panel did recognize that its decision was in conflict with the decision of the Sixth Circuit in *Smart* v. *Ellis*, 580 F.2d 215, 219 (6th Cir. 1978), *cert. denied*, 440 U.S. 998 (1979), citing *Smart* v. *Ellis* as "contra." Supp. App. at 5.

In sum, the decision of the Third Circuit in *Liotta* creates a direct conflict among the Circuits on the question of the "appropriate" state statute of limitations to be applied in an action seeking to relitigate a claim previously subject to "final and binding arbitration" on the ground that the arbitration was "tainted" by the Union's breach of its duty of fair representation in presenting the grievance to the arbitrator. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Both the Second and Sixth Circuits have rejected application of relatively brief statutes governing actions to vacate arbitration awards, instead applying far longer statutory periods governing contract (Second Circuit) or personal injury (Sixth Circuit) actions. In contrast,

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[2] Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a).

[3] That view was expressed by the Second Circuit in *Mitchell* v. *United Parcel Service Inc.*, (C.A. No. 79-7803, March 3, 1980), which was decided three weeks prior to the scheduled argument of the instant case, and which provided the basis for the summary reversal in the instant case. App. 6. The decision in *Mitchell* is reprinted at App. 7-13.

the Third Circuit applied the statute governing actions to vacate arbitration awards.[4] This split among the Circuits provides an additional, compelling reason why the important and frequently recurring question of federal labor law decided by the Second Circuit merits plenary review by this Court. See Pet. at 7-13.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, this Court should grant certiorari to re-

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[4] In *Liotta* only the employer, and not the union, was sued as a defendant. There is a suggestion at one point in the Third Circuit's opinion that had suit been only against the union and solely for damages resulting from the union's breach of its duty of fair representation—as opposed to a suit which "seeks to upset the arbitrator's decision"—a different question might have been presented. Supp. App. at 4. When a union takes a case to arbitration, it is doubtful that any recovery can be had against it without establishing that the arbitrator's decision was incorrect. See *Vaca* v. *Sipes*, 386 U.S. 171, 196-198 (1966). But in any event, that is not the issue here: here, as in *Liotta*, the plaintiffs seek to overturn the arbitration award and relitigate their grievances against their employer by alleging that the award was incorrect and "tainted" by the union's breach of its duty. Compare Pet. 4-5 with Supp. App. 2-4. The nature of the cause of action is thus precisely the same in the instant case as in *Liotta*. See *Hines, supra*. The absence of the union as a defendant in the latter case affects only the apportionment of possible damages. *Vaca* v. *Sipes, supra*.

solve the conflict in the Circuit Courts of Appeals and to decide the important question of federal law herein.

Respectfully submitted,

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United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

JAMES J. LIOTTA, an individual
Appellant in No. 79-2124

v.

NATIONAL FORGE COMPANY,
Appellant in No. 79-2252

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 78-0025)

Argued: July 8, 1980
Before: SEITZ, *Chief Judge*, VAN DUSEN,
and HIGGINBOTHAM, *Circuit Judges*
(Filed: September 10, 1980)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The appellant, James J. Liotta, formerly President of the Local 1573 of the United Steelworkers of America, AFL-CIO (the Union), was discharged from his employment with the National Forge Company (the Company) on March 16, 1976. This followed his participation in a work stoppage at the Company's Erie, Pennsylvania plant which began on March 3, 1976 and ended on March 11, 1976. Liotta filed a grievance pursuant to the terms of the collective bargaining agreement then in effect. His grievance was denied by an arbitrator on August 3, 1976. On March 16, 1978, he filed this action alleging first that his discharge violated the collective bargaining agreement in violation of Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 and that the arbitrator's contrary decision resulted from the Union's breach of its duty of fair representation. Second, he claimed that the Company discharged him because of his espousal of the rights of the Company's black employees, discriminating against him in violation of 42 U.S.C. § 1981. Liotta appeals from the entry of summary judgment for the Company. The Company cross appeals on the ground that Liotta's complaint is barred by the applicable statutes of limitations. We conclude that his claim under Section 301 is time barred, that his claim under 42 U.S.C. § 1981 is not time barred, and that summary judgment was inappropriate on his Section

1981 claim because of the existence of material issues of fact. We will therefore affirm in part and reverse in part.

I.

The first question we must answer is whether Liotta's Section 301 [1] cause of action was untimely and therefore whether the Company's motion to dismiss should have been granted. The Company's motion was based on the ground that Liotta's claims were barred by the three-month statute of limitations of the Pennsylvania General Arbitration Act. Pa. Stat. Ann. tit. 5 § 173 (Purdon 1963). The district court held that the six-year limitations period for actions upon a contract applied.

We believe the district court erred. In *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966), the Supreme Court held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Courts within this circuit have consistently applied the three-month limitations period to suits seeking to vacate an arbitrator's award. *Cole* v. *United Steelworkers*, 441 F.Supp. 1346, 1351 (M.D. Pa. 1977), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978); *Siskey* v. *General Teamsters, Chauffeurs*, 419 F. Supp. 48, 50 (W.D. Pa. 1976); *UMWA* v. *Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206, 1211-12 (W.D. Pa. 1974); *International Brotherhood* v. *Motor Freight Express*, 356 F.Supp. 724, 726 (W.D. Pa. 1973).

It is important to identify the nature of Liotta's first

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[1] Section 301(a) provides in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185.

cause of action since the three-month statute of limitations of Pennsylvania's General Arbitration Act would apply only where one seeks to vacate an arbitrator's award. A fair reading of Liotta's complaint demonstrates that he seeks to vacate the arbitrator's decision. Paragraph 22 of his complaint alleges that he "was unfairly represented before, during and after Arbitration by the" attorney for the International Union. App., at 10. Paragraph 23 alleges that the "Arbitration itself was improper and unfair." App., at 12. Indeed, he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge.

Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.

The result we reach comports with the general federal policy favoring arbitration as a means of resolving labor disputes, *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), and with the federal labor policy that favors the application of shorter limitations periods. In *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966), the Supreme Court stated:

> [R]elatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal.

Courts in other jurisdictions have consistently applied the statute of limitations pertaining to appeals from arbitration awards rather than the longer statute of limitations governing actions bottomed on written contracts when such actions seek to vacate arbitration awards. *E.g. Barbrino* v.

Anchor Motor Freight, Inc., 421 F.Supp. 1003 (W.D.N.Y. 1976); *DeLorio* v. *United Parcel Service, Inc.*, 401 F.Supp. 408 (D. Mass. 1975); *Hill* v. *Aro Corp.*, 275 F.Supp. 482 (N.D. Ohio 1967); *contra, Smart* v. *Ellis Trucking Co.*, 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

We therefore conclude that Liotta's first cause of action seeking review and vacation of the arbitration award was untimely and that the Company's motion to dismiss should have been granted.

II.

The next issue we must consider concerns Liotta's claim under 42 U.S.C. § 1981.[2] As a threshold matter however, we must first address the Company's assertion that this claim is also time barred.

As with Section 301, 42 U.S.C. § 1981 provides no explicit period of limitations and courts are bound to apply the most appropriate limitations period provided by state law. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). This court, in *Davis* v. *U.S. Steel Supply*, 581 F.2d 335 (3d Cir. 1978), held that the six-year statute of limitations for contracts under Pennsylvania law applied to a Section 1981 claim of unlawful discharge. We therefore conclude that Liotta's second cause of action under 42 U.S.C. § 1981 is not barred as untimely.

With regard to the merits of Liotta's Section 1981 claim, the district court granted the Company's motion for summary judgment for the following reasons:

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[2] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

> The only evidence which plaintiff has submitted to the court in support of his allegations is a letter from Bobby Kaigler, Compliance Officer of the Erie Human Relations Commission (EHRC), which states that plaintiff testified before the EHRC on behalf of black complainants who were discharged by defendant and that "It is the belief of this office that Mr. James Liotta was terminated from his job because of his constant fight for Equal Rights of all men." (Plaintiff's summary judgment exhibit 7n). This letter is not an affidavit and it has not been notarized. Consequently, the conclusory "belief" expressed in the letter, which is not based on personal knowledge, is insufficient to create or support an inference that racial discrimination played any part in plaintiff's discharge. Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141 (3rd Cir. 1972). No genuine issue of material fact supporting plaintiff's claim has been presented by plaintiff's evidence.

Liotta v. *National Forge Company*, Civ. No. 78-0025 (W.D. Pa. July 11, 1979) at 11-12, *reprinted in* App. at 45-46.

Liotta claims, however, that he also submitted to the district court the charge he filed with the Equal Employment Opportunity Commission (EEOC) listing a number of instances where he encouraged black employees to file charges against the Company. The affidavit which was attached to his EEOC charge and which was also before the court, alleged that the Company discharged him in retaliation for his activities in support of the rights of black employees. Specifically, he averred:

> I have consistently attempted to eliminate discrimination as practiced by Respondent Employer against Black members of Local 1573 of the United Steelworkers of America. The Respondent Company systematically has violated the non-discrimination clause known as Appendix I of the collective bargaining agreement between National Forge and Local 1573. Some of the ways I opposed discrimination, included the following: I encouraged a large number of Union members to report their allegations of discrimination to the Erie Human Relations Commission; since I began duties as President of Local 1573 in October, 1975, I encour-

> aged a number of Black workers to file charges with such Commission, and advised them of my knowledge of the best way to remedy the specific acts they were complaining of. I also fought the company on a day-to-day basis in trying to make conditions fair for all workers. I helped to take a case to arbitration on behalf of Black worker, Dennis Toliver. Shortly before my discharge, I had notified the Respondent Employer that two other grievances of Black workers (the grievances of Troy Johnson and Aaron Clanton) regarding discrimination claims, were going to be fought through the arbitration phase of the grievance procedure: I have appeared at a number of hearings of the Erie Human Relations Commission regarding the claims of discrimination by Black workers. Respondent Company has a history of unfair discharges of Black workers, and I have been active in opposing such practices.

App., at 51-52.

Our review of this document leads us to conclude that genuine issues of material fact are raised by Liotta's specific allegations. These are matters that clearly are in dispute and they are material because if proven they could support a finding that the Company's actions against Liotta were motivated by a racial animus.

In addition, contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations of wrongdoing by the Company. Moreover, the Company has not denied that these documents were in fact before the district court as part of the record. Instead, the Company challenges the EEOC affidavit as not complying with the technical requirements of Fed. R. Civ. P. 56(e) in that it was not alleged to be based on personal knowledge. That this argument is specious is evident from a reading both of the affidavit and of Rule 56(e). First, Rule 56(e) does not require that the affiant state affirmatively that the averments are based on personal knowledge. Rather, the Rule provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively

> that the affiant is competent to testify to the matters stated therein.

A reading of Liotta's EEOC affidavit shows that it was "made on personal knowledge," "set[s] forth . . . facts as would be admissible in evidence," and "show[s] affirmatively that [he] is competent to testify to matters stated therein."

The fact that these allegations may not be proved at trial if the jury chooses to believe the Company is irrelevant at this stage. What is relevant is that the parties have focused on specific, pertinent issues of fact and disagree strenuously about them. We therefore conclude that summary judgement was inappropriate and that the case should be remanded on the Section 1981 claim. *See Bryson* v. *Brand Insulations, Inc.*, No. 79-2042, slip op. at 7 (3d Cir. Apr. 30, 1980).

III.

Accordingly, we will affirm the district court's judgment as to Count I of the appellant's complaint. We will reverse the district court's grant of summary judgment on the appellant's Section 1981 claim and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit